FOR ARGUMENT

(11)

No. 93-1462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

JOSE RAMON MORALES,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, D.C. PRISONERS' LEGAL SERVICES PROJECT, INC. AND CLARENDON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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December 6, 1994

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INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37.3 of this Court, National Legal Aid And Defender Association, D.C. Prisoners' Project, Inc. and Clarendon Foundation respectfully submit this brief *amici curiae* in support of Respondent. Written consent to the filing of this brief has been granted by counsel for all

parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

National Legal Aid And Defender Association is a not-for-profit organization whose members include the majority of public defender offices, coordinated assigned counsel systems and legal services agencies throughout the Nation. The organization also includes two thousand individual members. NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights.

D.C. Prisoners' Legal Services Project, Inc. is a private, non-profit, public interest law firm established to provide free legal services to prisoners confined to the District of Columbia correctional system. The Project represents prisoners in individual and class action litigation concerning conditions of confinement, parole, access to medical care and access to the courts.

Clarendon Foundation is a non-profit, non-partisan legal and educational foundation concerned with contemporary issues related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The foundation participates in various forums in cases where the resolution of constitutional issues will implicate the broad rule of law.

Because this case raises a fundamental constitutional question with significant ramifications for the public interest, *amici* believe that their perspective will complement the brief of Respondent and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

This case comes to the Court at a time when there are substantial legislative initiatives throughout the States, as well as at the Federal level, to tighten parole eligibility requirements. As an expression of the will of the people, a legislature's statutory response is delimited only by the requirements of the Constitution. But those requirements, regardless of the political or social climate of the day, must be strictly honored. The retrospective statute challenged in this case cannot stand because it violates one of the most basic of such limitations upon governmental action -- the proscription against ex post facto laws.

The court of appeals properly assessed the ex post facto nature of the statute in question, reasoning by straightforward logic that a law making parole hearings less accessible effectively increases a prisoner's sentence because a hearing is a condition of parole eligibility. Petitioners' rejoinder -- that there is not a causal relationship between the frequency of hearings and parole -- relies upon Petitioners' assessment of the probability of harm in this particular case. That approach is ill-conceived, however, because the analysis of an ex post facto law can coherently be undertaken only with reference to the class of individuals potentially subject to its adverse effects. Moreover, Petitioners' actual harm test is wholly inconsistent with the principles upon which the ex post facto ban was predicated. The guarantees of fair notice and governmental restraint -- critical features of the social compact -- would be emptied of any genuine reliability under Petitioners' approach. Finally, an actual harm test conflicts with decisions of the Court which make clear that the appropriate focus of an ex post facto challenge is the texts of the prior and subsequent laws, rather than the State's quantification of probability of actual harm in the aftermath of the retrospective law's application.

ARGUMENT

Article I of the Federal Constitution establishes that neither Congress nor any State shall pass any "ex post facto Law." *See* Art. I, Sec. 9, cl. 3; Art. I, Sec. 10, cl. 1. The ex post facto prohibition forbids Congress and the States from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24 (1981), *citing Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867). Alexander Hamilton regarded the ex post facto proscription as one of a triad of constitutional securities "perhaps greater ... to liberty and republicanism than any [provisions the Constitution] contains." THE FEDERALIST, No. 84.

In addition, the earliest authorities explain that the Clauses were aimed at a second concern -- that legislative enactments "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham, supra*, at 28-29, *citing Calder v. Bull*, 3 Dall. 386, 388 (1798); 1 W. Blackstone, COMMENTARIES 46. Implicit in the prohibition is the notion that individuals be punished only in accordance with standards of conduct they might have ascertained before acting.

James Madison viewed ex post facto laws as "contrary to the first principles of the social compact and to every principle of sound legislation," warning that "[o]ne legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." THE FEDERALIST, No. 44. The ban restricts governmental power by restraining arbitrary and potentially vindictive legislation. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Thus, a core meaning of the ex post facto prohibition is a concern for "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed

when the crime was consummated." *Weaver*, 450 U.S. at 30.

In light of these principles, this Court in *Weaver, supra*, said that two critical elements must be present for a criminal or penal law to be ex post facto: "It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29, *citing Lindsey v. Washington*, 301 U.S. 397, 401(1937). Further, the Court has held that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

Viewed in the context of these legal parameters, it is clear *(1)* that the Ninth Circuit's analysis of the effect of the 1981 amendment was sound, and *(2)* that Petitioners' actual harm test would do violence to the principles underlying the ex post facto proscriptions.

I. THE COURT OF APPEALS PROPERLY ANALYZED THE UNCONSTITUTIONAL EFFECT OF THE 1981 AMENDMENT.

1. In this case, the Ninth Circuit ruled that the retrospective reduction in the frequency of parole eligibility hearings violated the proscriptions against ex post facto penalties. "By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed." *Morales v. Calif. Dept. of Corrections*, 16 F.3d. 1001, 1004 (1994). The court's reasoning was straightforward: "Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility.....Accordingly, any retrospective law

making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause. We base this conclusion on the Supreme Court's observation that the denial of parole is a part of a defendant's punishment. *Warden v. Marrero*, 417 U.S. 653, 662 (1974)." *Ibid.*

In rejoinder, Petitioners assert that the Ninth Circuit's rationale is a "flawed syllogism." Petitioners' Brief at 12. They argue that the denial of the opportunity for parole in this case was not substantial within the meaning of *Weaver*, Petitioners' Brief at 11-12. The essence of Petitioners' argument is that a "positive showing of detriment to the inmate," *id.* at 19, cannot be made on the facts of this case because "[i]t is inconceivable that any reasonable person could find that respondent would be ready for parole in the year immediately following the completion of his minimum term of imprisonment given the record in this case." *Id.* at 22. "The Board's findings, in light of the facts before it as to respondent's crimes and personality, are unimpeachable. Therefore, respondent was not detrimentally affected by postponement because he had no 'reasonable' expectation that the next annual hearings, were they to be held, would result in the granting of parole." *Ibid.* Petitioners thereby advocate an *actual harm* test which would require "a positive showing of detriment to the inmate," Petitioners' Brief at 19, in order to meet the *Weaver* standard.

2. Petitioners' counter-argument to the Ninth Circuit's rationale is unsound. Petitioners' criticism of the Ninth Circuit's reasoning is directed toward that court's employment of the concept of causation in the context of assessment of harm. The Ninth Circuit argued, in essence, that inasmuch as a parole hearing is a condition for being paroled, decreasing the frequency of parole hearings decreases the chances of being paroled. If the chances of being paroled are decreased, the inmate consequently suffers an increase in punishment, constituting a cognizable harm under the *Weaver* test. Petitioners challenge the part of this argument

which sets forth a causal relationship between a parole hearing and the probability of an inmate's being paroled. They attack this as a "flawed syllogism" on the ground that "[t]here is no inherent relation between the number of hearings and parole because frequency of appearance does not imply improvement of character." Petitioners' Brief at 21.

Petitioners further claim that the change in the law is not substantive because in order to cancel parole hearings that would have been held under the prior law, the parole board must determine that there is no "reasonable expectation" that the inmate would meet parole eligibility requirements. *Ibid.*

The error in Petitioners' argument can be seen by considering more carefully the nature of the causal connection identified by the court of appeals. This Court has defined a cognizable "harm" as a disadvantage flowing from a retrospective application of a law. *Weaver*, 450 U.S. at 29. More formally, such a harm can be said to occur when a condition is introduced which brings about negative consequences. One way of viewing this relationship -- the way Petitioner's view it -- would be to think of causality in terms of necessary or sufficient conditions for the occurrence of some further event -- here, the proposition that decreasing the frequency of eligibility hearings for Mr. Morales is a sufficient cause of a decrease in his chances of parole. But causation in this context must be thought of in a different sense. For example, smoking is a cause of cancer, but not a determinative cause because some people who smoke never contract cancer. Rather, the cause is merely probabilistic: Among the class of individuals who smoke, the chances of any one of them contracting cancer is higher than it is for the class of non-smokers.

Likewise, if the new law detrimentally affects the timing of parole for some inmates, it can be said to be a

cause of that outcome, in the probabilistic sense. It may be the case, as Petitioners claim, that Mr. Morales would not be affected by the change in this way. But that is not relevant because the validity of a causal dynamic in the sense in which the Ninth Circuit applied it only lies with reference to a general class of individuals. This is wholly appropriate because, as discussed below, that is the only level at which analysis of an ex post facto challenge can be addressed coherently. It is thus non-responsive for Petitioners to counter with an argument having to do with the degree of likelihood that Morales himself will be disadvantaged by the retrospective law.

This is plain when one considers that the law at the time of Morales' conviction and sentencing provided that he could be considered for a parole hearing at a certain juncture. In the view of the then applicable law, those in the class of which Morales is a member would be eligible for parole review according to how the legislature laid out that portion of the statute. Petitioners may argue -- even reasonably argue -- that the possibility of Morales benefitting from the timetable of that law is slim. The fact remains, however, that the law structured formerly so as to countenance that possibility, has now been changed in a way that diminishes the possibility. Because the "denial of parole is a part of a defendant's punishment," 16 F.3d at 1004, the later law is more onerous. As this Court has said: "The presence or absence of an affirmative, enforceable right is not relevant ... to the ex post facto prohibition ... Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint ... Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver*, 450 U.S.at 29.

II. PETITIONERS' ACTUAL HARM TEST IS INCONSISTENT WITH THE PRINCIPLES UNDERLYING THE BAN AGAINST EX POST FACTO LAWS.

1. The assessment of Mr. Morales' worthiness for parole is obviously a proper consideration for the parole board whenever Mr. Morales becomes eligible for parole review. But it is manifestly not a valid factor in determining whether the retrospective law disadvantages him. For this would put the State in the position of attempting to quantify empirically the likelihood of harm which might fall upon an inmate as a predicate for assessing the constitutionality of the retrospective law. This would be an unlawful procedure for several reasons.

First, the task of quantifying the likelihood of harm would occur not with enactment of the law by the legislature, but by definition, at a time *after* the date of the offense. The legislators who had authored the law would have no knowledge of its actual impact in a given case. Petitioners' proposal would thereby transform the parole board into a quasi-legislative body whose actual harm assessment had the force of prior law. That state of affairs would be no different in practical effect than if the legislature had written a subsequent law which expressly dictated that "Jose Ramon Morales" should not be paroled because of a determination that there is a "reasonable expectation" any earlier parole eligibility would be denied. That would clearly be contrary to "every principle of sound legislation," THE FEDERALIST, No. 44 (J. Madison). Moreover, it is well-established that one of the purposes of the ex post facto prohibition is to "uphold the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver*, 450 U.S. at n. 10.

Moreover, nothing in the text of the Ex Post Facto Clauses suggests that a quantification of the likelihood of harm is a threshold step in applying the ex post facto proscriptions. The reason should be obvious: The question of the effect of the new law on the timing of Morales' parole eligibility is only proper in the context of a comparison of the two laws. It is *laws themselves* -- the legislative acts -- which are the subject of the Ex Post Facto Clauses. *See* Art. I, Sec. 9, cl. 3; Art. I, Sec. 10, cl. 1. Institutional mechanisms such as parole boards, which are susceptible to changing assessments, are plainly outside the scope of the text. To reiterate, while the assessments of parole boards are fitting in the forum of parole eligibility review, they are utterly inappropriate for testing the constitutionality of a law. Thus, the only proper approach for evaluating an ex post facto challenge is a comparison of the texts of the prior and subsequent laws. As this Court said in *Weaver*, the proper focus of whether a retrospective statute is more onerous "*looks to the challenged provision*, and not to any special circumstances that may mitigate its effect on the particular individual." *Id.* at 33 (emphasis added).[1]

That a comparison of the texts of the respective laws is the only valid procedure for testing an ex post facto challenge, follows from the phrasing of the ex post facto provisos in the Constitution, which *by their terms* proscribe *the passage* of such laws. *See* Art. I, Sec. 9, cl. 3; Art. I. Sec. 10, cl. 1. It is at the level of the acts of legislatures that the ban focuses. Concern for "the lack of fair notice and governmental restraint" -- limitations which go to the

1 Petitioners' reliance upon *Weaver* to support its actual harm test is misplaced. *Weaver* did involve a situation where the offenders would be subject to "actual harm" by retroactive application of the sentencing guidelines to them. But nowhere in *Weaver* does the Court suggest that this is the type of harm necessary to meet its test. Indeed, *Weaver* implicitly endorses a comparative analysis. *See Weaver*, 450 U.S. at 38 (Rehnquist, C.J., concurring in the judgment).

nature of legislative actions -- are the core principles from which the *Weaver* test derives. *Miller v. Florida*, 482 U.S. 423, 430 (1987). These are notions which courts can only explore in an *a priori* way by comparing the texts of two laws. An actual, quantifiable proof of harm is no more appropriate in this context, than would be a requirement that an inmate prove he "personally" lacked "fair notice" of the more onerous penalty. These are judgments which can only be made by comparing the two laws.

Furthermore, nothing in the Court's prior pronouncements concerning the meaning or the underlying principles of the ex post facto ban suggests that a calculation of likelihood of harm is a legitimate factor in the equation. Marking bounds which will affect crucial liberty interests by resorting to a formula of "reasonable expectations," *see* Petitioners' Brief at 21, is grossly imprecise, even if it were procedurally valid. Indeed, the fact that the "reasonable expectation" approach is the best the California legislature could design is, itself, strong evidence that such an assessment is dangerously vague.[2]

The circumstances of the instant case require special scrutiny because the change in the law at issue is the plain product of a current political climate in which harsher sentencing and stricter parole requirements are gaining currency. Properly effectuated, of course, that result is a wholly legitimate exercise of the legislature. But improperly carried out, it is a grave constitutional violation. Madison's characterization of ex post facto violations as "contrary to

2 The feasibility of an actual harm test may be further undermined by the rule of lenity, which "prescribes the result when a criminal statute is ambiguous: the more lenient interpretation must prevail." *U.S. v. R.L.C.*, 112 S.Ct. 1329, 1339(1992)(Scalia, J., concurring in the judgment). The very notion that the benefit of doubt must flow to the defendant in cases where a statute is unclear suggests the overriding primacy of the text itself in matters affecting the potential degree of punishment.

the first principles of the social compact," THE FEDERALIST, No. 44, is particularly instructive on this score. The social compact -- as reflected in the terms of our Federal charter -- fixes the bounds of proper governmental action in consideration of the citizenry's submission to legislative enactments. For the compact to be valid, the members of society must be able to rely upon the legislature's respectful adherence to those bounds. The quintessential example of a breach of that responsibility is legislative action which violates a fixed constitutional principle because of a change in political wind or social sentiment. It appears that precisely this type of breach has occurred here.

2. Ironically, Petitioners acknowledge by implication the impropriety of their actual harm argument. Relying upon the Ninth Circuit's ruling in *Powell v. Ducharme*, 998 F.2d 710 (1993), Petitioners conclude that "speculation cannot be used to determine whether a new law prejudices an inmate." Petitioners' Brief at n. 7. The logical upshot of this position is that the "reasonable expectation" assessment of a parole board -- itself an inherently speculative endeavor -- should not be part of the ex post facto analysis. That analysis should focus on a comparison of the texts of the laws in question.

Petitioners' exclusive focus on the degree of likelihood of parole is at odds with this Court's seminal decision in *Lindsey v. Washington*, 301 U.S. 397 (1937). In *Lindsey*, the law in effect at the time the crime was committed provided for a maximum sentence of 15 years, and a minimum sentence of not less than six months. At the time Lindsey was sentenced, the law had been changed to provide for a mandatory 15-year sentence. To resolve the question whether the later law was more onerous than the former, the Court compared the "practical operation of the two statutes as applied to petitioner's offense." *Id.* at 400. Although it was true, as the State contended, that Lindsey might have been sentenced to fifteen years under the prior

law, the Court stressed that the "ex post facto clause looks to the standard of punishment prescribed by the statute, rather than to the sentence actually imposed." *Id.* at 401. "[A]n increase in the possible penalty is ex post facto regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the statute is more severe than that of the earlier. *Ibid.* Thus, the Court held that the removal of the possibility of a sentence of less than fifteen years operated to Lindsey's detriment because the degree of punishment required under the new statute was more onerous than under the previous law.

Lindsey establishes that the proper analytical context for an ex post facto challenge is a comparison of the texts of the prior and later laws. *See also Weaver*, 450 U.S. at 30 ("When a court engages in ex post facto analysis, which is concerned *solely* with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested rights....The critical question is whether the law changes *the legal consequences* of acts completed before its effective date")(emphasis added). The matter of detriment or harm to the challenger is assessed in that context only. A divergent procedure of the sort advocated by Petitioners, which calls for speculative quantification of the probability of "actual harm," is inconsistent with *Lindsey* and must be rejected.

There is at least one other sense in which Petitioners' argument for an actual harm test is analytically deficient. At the most fundamental level, the argument appears to beg the basic question. Once a parole board is satisfied that the likelihood of harm has been adequately quantified so as to rule out a concern for actual harm, the inquiry ends. This result, however, conflicts with the "axiom[ ] that [a subsequent law] must be more onerous than the prior law." *Dobbert*, 432 U.S. at 29. For it may be the case that a law

causes actual harm but also has ameliorative qualities outweighing the harm, and thus be constitutional; or a law may cause actual harm, have ameliorative qualities, but still be more onerous when examined *in toto* -- and therefore be unconstitutional. *See Weaver*, 450 U.S. at 38 (Rehnquist, C.J., concurring in the judgment). Because Petitioners' test relying on an assessment of actual harm bypasses the required comparison and moves immediately to a legal conclusion -- the conclusion which is supposed to be the result of first comparing the two laws in question -- it must be rejected.

* * *

For these reasons, Petitioners' criticism of the Ninth Circuit's holding is ill-founded. Moreover, as shown, Petitioners' actual harm test is inconsistent with the underlying principles of the ex post facto proscription and is analytically deficient.

CONCLUSION

Accordingly, the Court should affirm the decision of the Ninth Circuit.

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December 6, 1994

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† The substantial research and drafting assistance of Thomas B. Watson, Vani R. Singhal and Stephen L. Raymond of Georgetown University Law Center is gratefully acknowledged.